(19)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 1211 of 1999

Mahendra

Vs.

State of M.P. (Now Chhattisgarh)

JUDGMENT

Post for: 02.07.2007

Sd/-
Sunil Kumar Sinha
Judge

(20)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 1211 of 1999

APPELLANT — Mahendra Son of Khemlal Marar, aged about 20 years, resident of Ghoghopuri, P.S. Gurur, Distt. Durg, (C.G.)

Versus

RESPONDENT — State of M.P. (Now Chhattisgarh) through Police Station Gurur, District- Durg (C.G.)

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Inder Chand Rakecha, counsel for the appellant.

Shri Sushil Dubey, Govt. Advocate, for the State.

JUDGMENT
(02.07.2007)

SUNIL KUMAR SINHA, J.

(1) Being aggrieved with the judgment of conviction and order of sentence dated 17.4.99, passed by the Additional Sessions Judge, Balod, District- Durg (C.G) in Sessions Trial No.39/1999, whereby the said Court convicted the appellant under Sections 376 (1) & 450 of I.P.C. and sentenced him to undergo R.I. for 7 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 6 months and R.I. for 3 years and to pay a fine of Rs.100/-, in default of payment of fine to further undergo R.I. for 2 months with a further direction to run the sentences concurrently, the appellant has preferred this criminal appeal.

(2) The case of the prosecution is that on 11.11.1998 at about 9.00 p.m., the prosecutrix Dulari Bai (P.W.-1) was sleeping in her house along with her small children. Her husband had gone to the house of a neighbour for watching Television. Taking advantage of this situation, the appellant entered into her house and committed forceful intercourse against her. When he left her, she immediately narrated the story to one Sukli Bai (P.W.-3) and when her husband Pooranlal Sahu (P.W.-2) returned to the house, she also narrated the story to him. Thereafter, in the night itself, the First Information Report (Ex.-P/1) was lodged at about 23.45 hours. During the course of investigation, the prosecutrix was sent for medical examination and was examined by Dr. (Smt.) P. Baghel (P.W.-8), who gave her report Ex.-P/6 dated 12.11.98, according to which, there were no sign of struggle on the person of the prosecutrix, her vagina was healthy admitting two fingers and PS/PV examinations were normal. According to her opinion, she was habitual to sexual intercourse and there were no sign of recent intercourse. On further investigation, the appellant was also sent for medial examination and was examined by Dr. R.S. Bharadwaj (P.W.-11) on 12.11.98 at about 4.15 p.m. He gave his report Ex.-P/10, according to which, the appellant was competent to perform sexual intercourse. He had also noticed the presence of smegma on coronaglandis. The clothes of the prosecutrix as well as underwear of the appellant were also seized and were sent for chemical examination but the reports were not received.

(3) The conviction of the appellant is based upon the evidence of P.W.-1 Dulari Bai and P.W.-2 Pooranlal Sahu.

(4) Learned counsel for the appellant argued that in the facts and circumstances of the case, the version of the prosecutrix should be disbelieved, as she appears to be a consenting party.

(5) Dulari Bai (P.W.-1) has deposed that in the fateful night, she was sleeping along with her children, as her husband had gone out from the house, the appellant opened the door, entered into the house, gagged her mouth and thereafter, committed forcible sexual intercourse against her, due to which, she started weeping. After her release, she narrated the story to Sukli Bai and when her husband returned to the house, she also narrated the story to him and thereafter, the report was lodged. It comes in the cross-examination that her husband had gone out from the house 10-15 minutes prior to the time of incident. She has also admitted that when the entry was made, the lights were on. She had denied the suggestion that the appellant was called by her for repairs of fan of her house. She has also denied that when the appellant entered into the house, she switched off the lights. She has also denied that her husband had met with the appellant and when he asked to her as to why he had come there, she could not reply the same and on this, her husband started beating her.

(6) Pooranlal Sahu (P.W.-2), who is the husband of the prosecutrix, has stated that when he returned to his house at about 9.20 p.m., he saw the appellant in the *gali* of his house.

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When he went inside the house, he saw that his wife was weeping and when he asked as to why she is weeping, she replied that the appellant has committed rape against her. He has denied the suggestion in the cross-examination that his wife had not told about the rape committed by the appellant.

(7) Smt. Sukli Bai has been examined as P.W.-3. She has deposed that when she heard some noise, she came out from her house and saw that the prosecutrix and her husband both were there. The prosecutrix was weeping. The husband of the prosecutrix told to her that the appellant has committed rape against his wife.

(8) So far as argument regarding consent is concerned, that can be accepted in this case. It comes in the evidence of husband that as soon as he entered in the house, he saw that his wife (prosecutrix) was weeping. If the prosecutrix was a consenting party, there was no reason with her for weeping after the successful intercourse committed by the appellant. This is not the case in which, she was seen in compromising position with the appellant by somebody else or her husband, therefore, why she will be weeping, if she was a consenting party and everything was done according to her will. Not only this, why she will narrate the story of rape to the husband, when the husband had not asked anything regarding it or even the things relating to the presence of the appellant. It only comes in the evidence of husband that when she was simply asked as why she is weeping, she narrated the story of rape against her. Such

evidence of husband is supporting the evidence of the prosecutrix who says that when the appellant went out of her house after leaving her, she was weeping in the house. It is also supported by version of P.W.-3- Sukli Bai, who stated that she also saw the prosecutrix and the appellant in the night and the prosecutrix was weeping. Therefore, the arguments raised by learned counsel for the appellant that the prosecutrix was a consenting party, can not be accepted in light of the evidence of the prosecutrix as well as her husband.

(9) So far as medical evidence and absence of mark of resistance on the person of the prosecutrix are concerned, it is a case where the rape was committed on the cot that too after gagging the mouth of prosecutrix using considerable force against her. She is a married lady having 2 children, therefore, in such situation absence of mark of resistance as also absence of sign of recent intercourse would hardly make any difference, particularly when the victim was over powered and even she was not in a position to move at the time of commission of forceful sexual intercourse on a cot and was placed in completely helpless condition.

(10) I do not find any infirmity in the judgment of conviction and order of sentence passed by the Court below, there is no substance in this appeal, the same is accordingly dismissed.

Sd/-
Sunil Kumar Sinha
Judge

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